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NO. 80-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; AND EDWARD W. MAHER, Individually And In His Official Capacity,
Petitioners,

V.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK AND LINDA BROOKS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

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Petition for Certiorari Filed on June 18, 1981
Certiorari Granted on October 5, 1981

QUESTION PRESENTED

In a Title VII disparate impact case, have the respondents made a prima facie case of employment discrimination against the State of Connecticut by merely establishing (1) that they failed to succeed on a component of the selection process and thereby became ineligible to proceed further in the selection process, and (2) that the statistical results of such component, taken in isolation, had an adverse impact on respondents' minority group, when the respondents have not established that the appointments made as a result of the entire selection process have had an adverse impact on respondents' minority group?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut has not been officially reported. The Court's Memorandum of Decision is printed in the Appendix to the Petition for Writ of Certiorari (hereinafter "App. to Pet.") at pp. 18a-27a. The opinion of the Court of Appeals for the Second Circuit is reported at 645 F.2d 133 (2d Cir. 1981). The Court's slip opinion is printed in the Appendix to the Petition at pp. 2a-16a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on March 26, 1981. (App. to Pet., p. la). The jurisdiction of the Court was invoked under 28 U.S.C. § 1254 (1) when the petitioners filed their petition for a writ of certiorari on June 18, 1981; the petition was granted on October 5, 1981. The jurisdiction of the District Court to hear the issues material to this petition was invoked under § 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5. See Memorandum of Decision (App. to Pet., p. 19a).

STATUTES INVOLVED

The principal statute involved is § 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1976). The pertinent parts are set forth below:

> (a) it shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * *

> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . .

The petitioners' brief also contains references to several provisions of the Connecticut General Statutes, specifically § 422d(1937 Supp.) and §§ 5-193 — 5-195, 5-196(e) and (k), 5-198, 5-216 — 5-230, 5-272(d), 46a-68 — 46a-70. All state statutes cited in this brief are printed in sequential order in the Appendix to this brief.

STATEMENT OF THE CASE

Four respondents, Winnie Teal, Rose Walker, Edith Latney and Gracie Clack, who were plaintiffs below, are black employees of the Department of Income Maintenance of the State of Connecticut. Serving provisionally in positions in the classification of Welfare Eligibility Supervisor, they sought permanent promotional appointments to positions in that class. This required that they compete with other departmental employees in a merit selection process. The merit selection process involved a written examination and the selection by the appointing authority of appointees from a list of the persons who passed the examination. The selection of appointees from the list was made on considerations such as rank on the list, supervisory recom-

mendations, job performance, and interest in service in the geographical area where the vacancies existed.[1]

The four black respondents, along with the other four respondents who are white, and 321 others, took the examination on December 2, 1978.[2] The results were announced on March 15, 1979. All eight failed the examination. Of the 329 examinees, 48 identified themselves as black. The 26 blacks who passed the examination comprised 54.17 percent of the blacks who took the examination. The highest pass rate was among the 259 persons who identified themselves as white. Of these, 206, or 79.53 percent, passed. The examination pass rate for black candidates was approximately 68 percent of the examination pass rate for white candidates.

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[1]The Court of Appeals stated that as part of the final phase of the selection process, the petitioners employ an affirmative action program "to insure a large representation of minority candidates on the supervisory level." *Teal v. Connecticut,* 645 F.2d 133, 135 (2d Cir. 1981) (App. to Pet., p. 7a). The District Court made no finding regarding affirmative action in the selection of promotees from the list, nor was there any evidence at trial about the nature of any affirmative action program. While each state agency is required to develop an affirmative action plan (Conn. Gen. Stat. § 46a-68), such a plan is geared to assuring continuance of the State's long-standing commitment to non-discrimination and to equal employment opportunities. Conn. Gen. Stat. §§ 46a-69 - 46a-70. These plans are not based upon any history of past discrimination and therefore do not contain quotas to correct such wrongs. See *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979). In the absence of any contrary findings by the District Court, the trier of fact, it must be presumed that the successful candidates were promoted "...on the basis of merit and qualifications, without regard for race...[or] color" as required even by affirmative action law. Conn. Gen. Stat. § 46a-70(a). Any speculation about affirmative action in the selection of promotees will only obscure the issues presented herein.

[2]The issues presented by the petition directly pertain only to black respondents. The use of the term "respondents" will apply to them unless indicated otherwise.

The respondents commenced their suit on April 6, 1979, almost immediately after the certification of the promotion list but before the selection process had progressed to the point of making promotions from the list.

By the time of trial all blacks, who comprised 22.91 percent of the black candidates who took the examination, had received promotions to Welfare Eligibility Supervisor, while 35 whites, who comprised 13.51 percent of the whites who took the examination had received such promotions.[3] Thus the success rate among blacks who entered the selection process was 169.5 percent of the whites' success rate at the time of trial. Further promotions remained to be made from the promotional list, at least 12 to 15 more, including the eight vacancies being held for the respondents.

The District Court, in evaluating the selection process for adverse impact, used the "eighty percent rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission (hereinafter "The Uniform Guidelines"). 29 CFR § 1607.4D (1979). Under the four-fifths rule, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally

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[3]The Court of Appeals noted that no promotions were made until eleven months after the promulgation of the promotional list and only a month before trial. *Teal v. Connecticut, supra,* 645 F.2d at 136 (App. to Pet., p. 9a). Almost immediately after commencement of the suit respondents sought a preliminary injunction; this motion was not acted upon when the petitioners in a chambers conference agreed to delay promotions until trial on the merits. Docket entry for May 16, 1979 (J.A. 2). When the workload of the Department of Income Maintenance necessitated the appointment of supervisory personnel without delay, the petitioners made these promotions while agreeing to hold eight vacancies for the respondents, pending the outcome of the litigation.

be regarded . . . as evidence of adverse impact."[4] *Ibid.* Since the black selection rate (22.91 percent) was higher than the white selection rate (13.51 percent), the District Court found no adverse impact. No evidence of discriminatory intent having been presented,[5] the District Court ruled against the respondents on their Title VII claim. Memorandum of Decision of District Court (App. to Pet., p. 24a).

The District Court, on similar reasoning, denied the claim of the four black respondents under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976). *Ibid.* The claims of all eight respondents under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976), were also dismissed. On the § 1983 equal protection claims, the Court found a lack of proof of intent to discriminate, and on the due process claims the Court found the absence of a property interest. *Ibid.*

All eight respondents also made a pendent claim that the written test violated Conn. Gen. Stat. § 5-219, which requires that examinations for state employees "fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment." The District Court found this claim to be without merit. *Ibid.* (App. to Pet., p. 26a).

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[4]The position of petitioners should not be construed as conceding the validity of the "eighty percent rule" as a valid measure of adverse impact. The eighty percent rule is a "rule of thumb." It "is not intended as a legal definition." Question and Answer No. 11, "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures." 44 Fed. Reg. 11996, 11998 (1979); see also *Rich v. Martin Marietta Corp.*, 467 F.Supp. 587, 611 (D.Colo. 1979). The issue is not present in this proceeding.

[5]In their amended complaint, the subject respondents alleged that the petitioners' use of the examination constituted intentional discrimination. Amended Complaint, ¶ 21 (J.A. 6).

The respondents appealed to the Court of Appeals two of the District Court's rulings, the one on the Title VII issue and the one on the pendent claim.

The Court of Appeals reversed the District Court on the Title VII issue, holding that the examination itself must be assessed for adverse impact, because it constituted a pass/fail barrier beyond which the black respondents, having failed it, were not allowed to proceed. Since the examination results, considered by themselves, had an adverse impact on blacks, a prima facie case of employment discrimination was established, notwithstanding the fact that the results of the overall selection procedure produced no adverse impact on blacks. *Teal v. Connecticut, supra,* 645 F.2d at 135 (App. to Pet., p. 5a). That ruling is the subject of this writ of certiorari.

SUMMARY OF THE ARGUMENT

There are two types of Title VII cases, "disparate treatment" and "disparate impact" actions. The former involves intentionally different treatment of people in the employment setting on the basis of their race, color, religion, sex, or national origin. The latter centers on facially neutral employment practices which adversely affect the employment of one protected group's members more than those of another and cannot be justified by business necessity; discriminatory motive is not necessarily an essential element of this type of case. While in a disparate impact case the burden of showing that an employment practice has a manifest relationship to the employment in question falls on the employer, this burden does not become operative until the employee or prospective employee establishes a prima facie case of discrimination.

This case deals with alleged discrimination against the respondents' racial group because a disproportionate number of members of that group failed to pass a facially neutral employment test and were unable to continue on in the promotion process. The Court must determine in this case whether in the absence of discriminatory intent, a showing by a plaintiff of sta-

tistically adverse impact on his protected group at the component level without a showing that the protected group was statistically underrepresented in terms of the end product of the selection process, "the bottom line." is sufficient to establish a prima facie case of unlawful discrimination so as to cast on the employer the onerous burden of establishing the job relatedness of the component. Stated more basically, the Court must refine the basic concept of Title VII "discrimination," with respect to whether in such cases Congress intended it to apply to final personnel actions such as hiring, promotions, transfers and the like, or also to unintentional adverse impact at intermediate steps leading to these decisions.

Although the term "discrimination" is not statutorily defined, the Court has required an employer to justify a neutral, adversely impacting criterion only where there has been a disproportionate impact in the numbers of protected class members hired or promoted. This approach corresponds to the paramount objective of Congress in enacting Title VII, *i.e.*, improving the economic situation of blacks by integrating them into the mainstream of American society. The bottom line concept accurately mirrors this Congressional intent.

Additionally, the Court has required employers to justify neutral employment requirements or criteria in cases in which the requirements further operate to discriminate *invidiously*. These requirements have been deemed invidious in three senses: (1) when the employer knows or should know from demographic statistics that a requirement will adversely impact upon a protected group; (2) when a requirement is used to perpetuate past discrimination; and (3) when a requirement is used to exclude members of a culturally or educationally deprived group and their cultural or educational deprivation is directly traceable to their race. In none of these senses was the promotional examination in this case shown to be invidious.

The use of test statistics alone in a disparate impact case does not present an accurate picture of discrimination in light of Congressional intent. A plaintiff should not be deemed to have

established a prima facie case solely by showing a disparate impact upon his protected group of the test results when he fails to demonstrate by statistical evidence that the end results of the selection process have produced a disparate impact on his group and when there is no other evidence of unlawful discrimination. Determining impact on the bottom line will place no undue administrative burden on the courts.

Federal agencies involved in Title VII and similar civil rights enforcement responsibilities have treated adverse impact as a bottom line approach. This is evident from the Uniform Guidelines for Employee Selection Procedures adopted by several federal agencies, including the Equal Employment Opportunity Commission. Accordingly, the Uniform Guidelines have translated this concept into an administrative rule.

Without a rule gauging disparate impact at both the criterion and selection levels, both the courts and employers will be saddled with unreasonably heavy burdens. In view of the fact that Title VII protects persons of all races and national origins and both sexes, disparate impact could be found at several levels and on behalf of several groups. Without a realistic bottom line approach, public and private employers will be unable to conduct their affairs with confidence and courts will be regularly reduced to reviewing the job relatedness of employment examinations and even of individual examination sections or questions.

The examination in issue was protected by the Mansfield-Dirksen Amendment, which, *inter alia,* inserted the first portion of § 703(h) so as to exclude from the purview of an unlawful employment practice action taken pursuant to a bona fide merit system which did not result from an intention to discriminate. The legislative history surrounding the adoption of the Tower Amendment reveals that the merit system examinations were protected by the Mansfield-Dirksen Amendment. The record in this case clearly indicates that the subject examination was given as a part of Connecticut's merit system. The system, which has existed for over forty years, is unquestionably bona fide. There was no intention to discriminate impermissibly as evidenced by

the selection rate of promotees and the absence of any other evidence of discriminatory intent.

Additionally, the competitive nature of the merit system in Connecticut and other states is based by law upon the ranking of candidates. Courts and the Equal Employment Opportunity Commission have required additional validation of examinations used as ranking devices as opposed to mere pass/fail devices. This burden is onerous. States and local governments can amend state or local laws to change the nature of their merit systems in this respect only at the expense of other very important governmental objectives. Thus, Title VII will have proven to be harsher on public employers than on private employers.

ARGUMENT

I.

INTRODUCTION

Title VII cases fall into one of two categories: "disparate treatment" or "disparate impact" — or a combination of each. In "disparate treatment," "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). Claims of "disparate impact" are those which "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity....Proof of discriminatory motive...is not required under a disparate impact theory." *Ibid.*

> Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing that the acts they complain of constituted dis-

> crimination in violation of Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425.

General Electric Co. v. Gilbert, 429 U.S.125, 137 n. 14 (1976). First, however, such plaintiffs must sustain the burden of establishing a prima facie case of illegal discrimination. *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 358; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

This action reaches this Court as a "disparate impact" suit.[6] This Court has held that in such a case claiming discrimination against a racial group resulting from a facially neutral employment test, a plaintiff makes out a prima facie case by showing "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); see also *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). A prima facie case in a Title VII action is a "legally mandatory, rebuttable presumption." *Texas Department of Community Affairs v. Burdine*, _____ U.S. _____, 101 S.Ct. 1089, 1094 n. 7, 67 L.Ed.2d 207, 216 (1981). Once this showing is made, the defendant employer must bear "the burden of showing that any given requirement [has]. . . a manifest relationship to the employment in question." *Dothard v. Rawlinson, supra*, 433 U.S. at 329; *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 425.

The issue presented by this case, however, is whether the employer must bear the burden of proving the job relatedness of his examination, when the members of plaintiffs' minority group are not underrespresented among those selected to fill the vacant positions for which success on the examination was one of several selection criteria. That is to say, should a court's

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[6]The amended complaint also alleged disparate treatment, but the Court of Appeals ruled that the District Court correctly treated this case as one of "disparate impact." *Teal v. Connecticut, supra*, 645 F.2d at 137 (App. to Pet., pp. 10a-11a).

vision be narrowed to an exclusive concern with the statistics as to the relative success rates on one segment of the selection process, the examination, or should a court look to the statistics regarding the results of the selection process as a whole, *i.e.*, the so-called "bottom line" statistics, before it imposes on an employer the burden of establishing the "manifest relationship" of an examination to the employment in question?

The answer to this procedural question will depend in large part on a basic substantive consideration; that is, what is the purview of employment discrimination subject to the strictures of Title VII? The respondents have based their cause of action on the claim that the "*examination discriminated* against blacks in that a disproportionate number of black candidates were excluded in the promotional process as a result of the examination, and in that the examination did not reflect adequately the candidates' ability to perform the jobs in question." Amended Complaint, ¶ 19 (J.A. 6) (emphasis added).

However, examinations do not unlawfully discriminate. Employers (or labor unions or employment agencies) may. 42 U.S.C. § 2000e-2(a), (b), (c). Examinations may be used as instruments of discrimination. But unlawful discrimination and the instruments by which it is accomplished are not the same thing. Accordingly, this Court must refine the concept of discrimination in an adverse impact case. Certainly Title VII would forbid any intentional racial discrimination against the respondents, whether in connection with the merit examination they took, or in connection with any other procedure which was part of the process for selection of the persons to be promoted to Welfare Eligibility Supervisor. Such intentional discrimination is absent in this case. In these circumstances, does a proper construction of Title VII require, under a disparate impact analysis, that the examination which the respondents took be proved to be job related when the evidence shows no disparate hiring or promotion impact on respondents' minority group?

II.

RESPONDENTS' PROOF OF THEIR FAILURE TO PASS A WRITTEN EXAMINATION AND OF THE DISPARATE IMPACT OF THE EXAMINATION ON THE PROTECTED CLASS OF WHICH THEY ARE MEMBERS DID NOT MAKE A PRIMA FACIE SHOWING OF A VIOLATION OF 42 U.S.C. § 2000e-2

A. Consistent With Congressional Intent, The Court Has Reviewed Employment Criteria Only Where Disparate Impact Has Been Present In The Total Selection Process.

Title VII of the Civil Rights Act of 1964 deals with discrimination by employers against employees or prospective employees on the basis of their race, color, religion, sex, or national origin. 42 U.S.C. § 2000e, *et seq.* Yet nowhere in Title VII are the terms "discrimination" or "discriminate" defined. *General Electric Co. v. Gilbert, supra,* 429 U.S. at 133. In disparate impact cases decided by this Court under § 703 of Title VII, 42 U.S.C. § 2000e-2, however, the Court has scrutinized a facially neutral and disparately impacting selection criterion only when there has been a disparate impact at the bottom line in the numbers of protected class members who were hired or promoted.[7]

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[7]Section 703(a) expressly states what is an unlawful employment practice for an employer, while § 703(h), by its very terms, states only what is not an unlawful employment practice. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976), the Court did state:

> [A]s with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not.

Yet, in making that statement the Court was responding to an employer's claim that the seniority system provision of § 703(h) shielded it from liability under § 703(a) for refusing to hire members of a class of black petitioners on the basis of race. Sec. 703(h) came into issue

Griggs v. Duke Power Co., 401 U.S. 424 (1971), the first relevant decision on adverse impact, was clearly premised upon the inability of black employees to progress to higher paying, more desirable positions in the company. In that case there was a significantly small transfer rate among blacks out of the company's Labor Department, which contained unskilled, low-paying positions. *Id.* 401 U.S. at 429; see also *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1239 (4th Cir. 1970) (Sobeloff, J., concurring in part and dissenting in part, below). The employer had as alternative requirements for transfer out of the Labor Department the holding of a high school diploma and the passing of certain general intelligence and mechanical comprehension tests. Only after it had been determined that blacks as a group were being excluded by these prerequisites from the better jobs did the Court require the judicial scrutiny of them for job relatedness. *Id.* 401 U.S. at 430-431.

Likewise, in *Albemarle Paper Co. v. Moody, supra,* the employer required the passing of a non-verbal intelligence test and a general verbal facility test for entry into skilled lines of progression. Blacks passed the tests at only 64 percent of the rate at which whites passed. *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 138 n. 1 (4th Cir. 1973). Few blacks succeeded in transferring to the skilled lines of progression. *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 428-429. It was in these circumstances that this Court required judicial scrutiny of the tests for job relatedness.

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only after "the illegal discriminatory refusal to hire" had been established. *Ibid.* The Court's statement must be read in light of its context in *Franks,* namely, that § 703(h) defines legal or illegal employment practices thereunder only when the employer seeks a refuge under that provision because without its protection a plaintiff has otherwise established a case of discrimination against the employer under § 703(a). See *id.* 424 U.S. at 761; also *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 346-347; *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 559-560 (1977).

In *Dothard v. Rawlinson, supra,* the touchstone of the Court's review of statutory minimum height and weight requirements for correctional counselors in a state's prison system was the disparity in the percentage of females actually employed in such positions in the system in relation to the percentage of males so employed. *Id.* 433 U.S. at 327-328. The Court then ruled that the employer had failed to establish the job relatedness of the requirements. In *Dothard,* the Court recognized the necessity of establishing bottom line discrimination, which concept emanated from *Griggs* and *Albemarle,* when it stated:

> We dealt in *Griggs v. Duke Power Co., supra* and *Albemarle Paper Co. v. Moody,* 422 U.S. 405, with similar allegations that facially neutral employment standards *disproportionately excluded Negroes from employment,* and those cases guide our approach here.

Id. 433 U.S. at 329 (emphasis added).

On the other hand, in *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973), the employer's policy of requiring American citizenship in order to be eligible for employment was not shown to exclude any national origin group from employment and there was no history of such discrimination. Consequently there was no violation of Title VII. *Id.* 414 U.S. at 95.

The Court's regard for the bottom line is thoroughly consistent with the purpose of Title VII. The primary concern of Congress in enacting Title VII was "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Blacks had traditionally been relegated to unskilled and semiskilled jobs. As a result of automation, the number of such jobs was rapidly decreasing and the impact of structural unemployment was falling disparately on blacks. "The crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Ibid.* Otherwise, "Congress feared that the goals of the Civil Rights Act — the integration of blacks into the mainstream of American society

— could not be achieved...." *United Steelworkers of America v. Weber*, 443 U.S. 193, 202 (1979). Title VII was directed at an "historic evil of national proportions." *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 416.

> The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 800.

International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 348. For this reason "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[8] *Griggs v. Duke Power Company, supra*, 401 U.S. at 432. In other words, "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 339-340 n. 20.

B. Consistent With Congressional Intent, The Court Has Reviewed Employment Criteria For Job Relatedness Only Where Use Of Such Criteria Has Resulted In Invidious Discrimination.

There was an additional facet of the *Griggs*, *Albemarle* and *Dothard* cases which, in conjunction with the disparate impact at the hiring or promotion level, led the Court to endorse judicial scrutiny of the arbitrariness, or the degree of job relatedness, of the facially neutral high school diploma and testing requirements

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[8]In *Griggs*, the "employment practices" included the diploma requirement and the tests, but their "consequences" were the inability of blacks either to gain skilled jobs with the employer or advance in the company. See *id.* 401 U.S. at 427-428.

in *Griggs*, the testing requirements in *Albemarle*, and the height and weight requirements in *Dothard*. That facet was the "invidiousness" of those requirements.

> In enacting Title VII, Congress required 'the removal of artifical, arbitrary and unnecessary barriers to employment when the barriers operate *invidiously* to discriminate on the basis of racial or other impermissible classification.' *Griggs v. Duke Power Co.*, 401 U.S. 424, 431.

Dothard v. Rawlinson, supra, 433 U.S. at 328 (emphasis added).

In *Griggs* the alternative requirements of a high school diploma or the passing of tests, was invidious in three ways. First, the high school diploma requirement had, from demographic statistics, a predictably adverse impact on blacks. The 1960 census statistics revealed that 34 percent of white males in North Carolina had completed high school but only 12 percent of blacks had. *Griggs v. Duke Power Co., supra*, 401 U.S. at 430 n. 6. Consequently the employer was creating a known "barrier" or "headwind" for a protected group. Secondly, the Duke Power Company had had a history of racial discrimination. Prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Duke Power Company had restricted blacks to its Labor Department. *Ibid.* 401 U.S. at 427-428. When this segregation policy ended in 1965, the high school diploma and testing requirements, since they impacted more severely on blacks, tended to "'freeze' the status quo of prior discriminatory employment practices." *Id.* 401 U.S. at 430. Thirdly, the company was located in North Carolina, where blacks had long received inferior education in racially segregated schools. *Ibid.* As a consequence, blacks in North Carolina had been deprived of the means to articulate their basic intelligence. Therefore, the fact that blacks did more poorly than whites on the employer's intelligence tests "would appear to be *directly traceable to race*" in the sense that blacks, as a racial group, were culturally

deprived in North Carolina's segregated school system. *Ibid.* (emphasis added).

In *Albemarle,* the testing requirement was "invidious" in the second and third senses above. The Court viewed the question of job relatedness "in the context of the plant's operation and the history of the testing program." *Id.* 422 U.S. at 427. *Albemarle* had had a history of intentional job segregation by race. *Id.* 422 U.S. at 409. The use of the tests tended to "freeze" the segregated pattern in jobs which had sprung up in the period of intentional racial discrimination. Further, the Albemarle Paper Company was located in North Carolina as was Duke Power Company. There blacks, because of their race, had been restricted by law to racially segregated schools. Their poorer performance on intelligence tests was directly traceable to their blackness, which had landed them in culturally deprived, inferior schools.

In *Dothard v. Rawlinson, supra,* the facially neutral criterion, the height and weight requirement, operated invidiously in the first sense, the sense of predictably adverse impact based on demographic data. According to population statistics, the statutory height and weight requirements for prison guards would exclude more than 41 percent of the female population and less than one percent of the male population. *Id.* 433 U.S. at 329-330.

In the instant case, there is no invidious barrier in any of the above senses. First, there was no built-in headwind discernible from demographic statistics. The test was developed specifically for the selection procedure in issue. Secondly, the test did not operate to freeze the status quo of past discrimination. Thirdly, Connecticut, like many other states, has never had a dual system as to which it could be said that the education of blacks was, on account of their race, inferior and culturally deprived. Under such circumstances, to identify a protected class, whether it be a racial, an ethnic or a gender-based class, with cultural deprivation, would violate the Court's own tenet that "[p]ractices that classify employees in terms of religion, race or sex tend to

preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."[9] *City of Los Angeles, Dept. of Water v. Manhart*, 435 U.S. 702, 709 (1978).

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[9]Senator Tower's Amendment which, after rewording, became the professionally developed ability test provision of § 703(h) was intended, *inter alia*, to protect employers against claims that discrimination against the culturally deprived was ordinarily to be equated with discrimination against a protected class. In the debate on the first version of his amendment (see *Griggs v. Duke Power Co., supra*, 401 U.S. at 436 n. 12), Senator Tower stated:

> Senators will recall that in the Motorola case the FEPC examiner found that the test used to select employees was discriminatory to culturally deprived or disadvantaged groups, in the words of the FEPC examiner.
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> * * *
>
> The FEPC examiner stated that the test could not be used; that the test was a denial of a fair employment opportunity, because it discriminated against what he vaguely called culturally deprived or disadvantaged groups.

110 Cong. Rec. 13492 (1964).

The Tower Amendment, as finally adopted as part of § 703(h), expressly protected professionally developed ability tests unless "designed, intended or used to discriminate because of race, color, religion, sex or national origin." In this case, which lacks the "cultural deprivation" circumstances present in *Griggs* and *Albemarle*, there is no basis, other than "traditional assumptions," for equating poorer performance by blacks on the test with use of the test as a device discriminating against them because of their race. There is nothing in the Tower Amendment which would require the petitioners in the case to establish the job relatedness of the examination.

The bills of the proponents of the 1964 Civil Rights Act did not mention employment examinations nor were there any legislative findings that such tests were intrinsically discriminatory so as to be subject to any direct proscription. The Tower Amendment was occasioned by

In such circumstances, to pursue the imagery of *Griggs*, when the respondents' protected group did not fail to get a fair share of the milk, there is no need for judicial scrutiny of each nook and cranny of the vessel. See *Griggs v. Duke Power Co., supra,* 401 U.S. at 431.

C. The Appropriate Evidentiary Rule Must Take Into Account All Relevant Statistics Regarding The Employer's Hiring Or Promotion Decisions.

In determining whether or not to measure adverse impact at the bottom line, the Court must exercise its powers "in light of the large objectives of the Act." *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 416; see also *Hecht Co. v. Bowles,* 321 U.S. 321, 331 (1944).

In light of the purpose of Title VII, it is in the sense of "select[ions]...for hire" (*Dothard v. Rawlinson, supra,* 433 U.S. at 329; *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 425), rather than in the sense of determining continuation in the hiring process, that statistics as to the success rate of protected groups are significant. Consequently, it is not so much the sta-

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several Senators concerned that, once enacted, Title VII could be used to prohibit virtually all employment examinations in the fashion of the decision by the state hearing examiner. See *Griggs v. Duke Power Co., supra,* 401 U.S. at 434 n. 10; see also Part III, *infra.* Senator Tower even stated that such a use of Title VII would force an employer to hire persons whom he did not believe to be competent and this "could result in the destruction of the free enterprise system as we know it." 110 Cong. Rec. 9026 (1964). "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'Management prerogatives and union freedoms...be left undisturbed to the greatest extent possible.'" *United Steelworkers of America v. Weber, supra,* 443 U.S. at 206. The Tower Amendment was likewise an accommodation to safeguard generally the use of employment examinations by employers. See 110 Cong. Rec. 13492-13505, 13650-13651, 13724 (1964).

tistics regarding the impact of the particular criterion with which the Court should be concerned. Of real significance are the statistics regarding the rate of selection for hire or promotion of candidates from a protected class.

"Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality." *Griggs v. Duke Power Co., supra,* 401 U.S. at 433. In this case, test statistics are not the only useful servants, because they do not reflect reality in its entirety. The promotional statistics reveal that the promotion rate of black candidates was 169.5 percent of that of white candidates. Reality also includes the absence of any discriminatory motive on the petitioners' part and of any findings that the State of Connecticut, as an employer, has had any history of racial discrimination. In this context, the petitioners have satisfied Congress' concern with minority citizens penetrating the job market by eliminating intentional employment discrimination and the consequences of unwitting actions resulting in racial job segregation.

The petitioners submit that it is not enough for a plaintiff to introduce evidence as to any disparate impact of examination results on the protected group of which he is a member. In order to make a prima facie case of unintentional employment discrimination based on the statistically adverse impact of the employee selection process on the plaintiff's protected class, a plaintiff must also show the statistically significant adverse impact of the entire selection process on his protected class. Only then should a decision be made to pass over from the threshold inquiry of disparate impact to the issue of the job relatedness of an examination or any other component of the selection procedure.

> [T]he facts necessarily will vary in Title VII cases and the specification...of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.

McDonnell Douglas Corporation v. Green, supra, 411 U.S. at 802 n. 13, quoted in *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 358.

> [S]tatistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 340; see also *Hazelwood School District v. United States,* 433 U.S. 299, 319 (1977); *New York Transit Authority v. Beazer,* 440 U.S. 568, 584 n. 25 (1979).

Furthermore, the pattern projected by one set of statistics can be disparaged or altered by another set of statistics.

> If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the realiability of the statistical evidence, they may offer rebutting evidence, they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.

Dothard v. Rawlinson, supra, 433 U.S. 321, 338-339 (Rehnquist, J., concurring), quoted in *Hazelwood School District v. United States, supra,* 433 U.S. at 319 n. 8 (Stevens, J., dissenting).

Moreover, determining impact at the bottom line need not create an administrative problem for the courts even when the employer is a governmental entity, as here. Among those states which have a statutory minimum duration for a state service em-

ployment list,[10] that minimum duration is usually short. For example, in Connecticut the minimum duration is only six months.[11] In cases involving a public merit system employer, the use of bottom line statistics should not unduly delay the trial of the case.

Therefore, requiring a plaintiff in a Title VII disparate impact testing case to establish a disparate impact at the hiring or promotional stage as well as at the testing stage will reflect the large objective of Title VII, opening the ranks of skilled occupations to members of minority groups.

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[10]Cal. [Gov't Code] § 18901(a) (West 1980) (1 year)
Colo. Rev. Stat. § 24-50-112 (1973) (1 year)
Hawaii Rev. Stat. § 76-23 (Supp. 1980) (1 year)
Ind. Code § 4-15-2-14 (1976) (6 months)
Iowa Code Ann. § 19A.9(5) (West 1978) (1 year)
Kan. Stat. Ann. § 75-2942(2) (1975) (1 year)
Ky. Rev. Stat. Ann. § 18.210(5) (Baldwin 1981) (2 years)
Mass. Gen. Laws Ann. ch. 31, § 25 (West Supp. 1981) (2 years)
Minn. Stat. Ann. § 43.17 (West Supp. 1981) (6 months or 1 year)
Mo. Ann. Stat. § 36.320(2) (Vernon 1969) (1 year)
Nev. Rev. Stat. § 284.250 (1979) (1 year)
N.J. Stat. Ann. § 11:9-10 (West 1976) (6 months)
N.Y. [Civ. Serv.] Law § 56 (McKinney Supp. 1980) (1 year)
Ohio Rev. Code Ann. § 124.26(A) (Page 1978) (1 year)
Tenn. Code Ann. § 8-30-308 (Supp. 1980) (6 months)
Wis. Stat. Ann. § 230.25(3) (West Supp. 1981) (6 months)

[11]Conn. Gen. Stat. § 5-217 provides:

> The commissioner of administrative services shall specify, at the time any employment list is promulgated, the period during which such list shall remain in force. In no case shall an employment list remain in force for a period of less than six months or more than one year, unless the period is extended by the commissioner for a period not to exceed an additional two years.

D. Federal Agencies Administer Title VII On The Basis Of Impact On The Bottom Line.

Federal agencies charged with civil rights enforcement responsibilities under Title VII and similar authorities have viewed unlawful discrimination based upon adverse impact in terms of ultimate personnel decisions. This Court has given such administrative interpretations "great deference" in determining Congressional intent. *Griggs v. Duke Power Co., supra,* 401 U.S. at 433-434. The Uniform Guidelines on Employee Selection Procedures (UGESP) were adopted jointly in 1978 by the Equal Employment Opportunity Commission (EEOC), the Department of Justice (Justice), the Labor Department (Labor), and the Civil Services Commission (CSC).[12] The guidelines purport to assist employers in complying with federal anti-discrimination law by providing "a framework for determining the proper use of tests and other selection procedures." 29 CFR § 1607.1B.[13] But "these guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results." *Ibid.* The guidelines expressly define "adverse impact" as "[a] substantially different *rate of selection in hiring, promotion or other employment decision* which works to the disadvantage of members of a race, sex or ethnic group." 29 CFR § 1607.16B (1979) (emphasis added). "Selection rate" is "[t]he proportion of applicants or candidates who are hired, promoted, or otherwise selected." 29 CFR § 1607.16R (1979).

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[12]The guidelines resulted from a Congressional mandate for uniformity among federal agencies in this area. 42 U.S.C. § 2000e-14. The first response was the Federal Executive Agency Guidelines published in 1976. 41 Fed. Reg. 51736 (1976) (Justice); 41 Fed. Reg. 51745 (1976) (Labor); 41 Fed. Reg. 51753 (1976) (CSC). The EEOC did not join in those guidelines. 41 Fed. Reg. 51734 (1976).

[13]CFR citations are to the UGESP as adopted by the EEOC. The UGESP in the same form were published by three other agencies in the titles of CFR assigned to them. See 5 CFR § 300.103(c), *et seq.* (1977) (CSC); 28 CFR § 50.14, *et seq.* (1979) (Justice); 41 CFR § 60-3, *et seq.* (1979) (Labor).

Substantively, the guidelines trigger requirements to report information and validate selection procedures on the basis of adverse impact in the "total selection process." See, *e.g.*, Questions and Answers, Nos. 13 and 14, "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures."[14] 44 Fed. Reg. 11996, 11998 (1979).

Accordingly, federal agencies have translated their interpretation of adverse impact in terms of the bottom line into an administrative and prosecutorial guideline. The guideline explicitly does not require evaluation and validation of components, or enforcement action, "in usual circumstances," based upon adverse impact of a component when the total selection process reveals no adverse impact.[15] 29 CFR § 1607.4C (1979). At least one court has suggested the judiciary adopt this standard:

> [B]ut in allocating resources of governmental agencies, it also indicates a threshold of administrative concern about different hiring practices. At least in the absence of discriminatory intent, the threshold of judicial inquiry should be set at the same level.

Brown v. New Haven Civil Service Board, 474 F.Supp. 1256, 1263 n. 10 (D.Conn. 1979).

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[14]The substantive requirements of the FEA guidelines published by Justice, Labor and CSC prior to their use of the UGESP were likewise predicated upon adverse impact in the total selection process. See, *e.g.*, Questions and Answers, Nos. 3, 6 and 7, Questions and Answers to Federal Executive Agency Guidelines, 42 Fed. Reg. 4052, 4053 (1977).

[15]Obviously, the guideline cannot be hard and fast. As the Court of Appeals observed, many cases involve both disparate treatment and disparate impact. *Teal v. Connecticut, supra,* 645 F.2d at 137 (App. to Pet., p. 11a). Therefore, lack of disparate impact in a testing case may not foreclose a Title VII claim if other evidence of discrimination is present.

E. Exclusive Reliance On The Disparate Impact Of A Single Stage Of The Employee Selection Process Will Place Unreasonable Burdens On The Courts And On Employers.

The petitioners' position is also grounded on considerations of sound judicial administration. For the Court to require employers to bear the burden of showing manifest relationship to the employment in question of any requirement in the selection process which has an adverse impact on a protected group would be to place "a court on a course that has no boundaries and no clear end." *Brown v. New Haven Civil Service Board, supra,* 474 F.Supp. at 1262; see also *Friend v. Leidinger,* 588 F.2d 61, 66 (4th Cir. 1978). Such fragmentation of the selection process would increase the chances of finding adverse impact at some point in the process. In a situation with five identifiable protected classes (*e.g.*, blacks, Hispanics, whites, women and men)[16] and with five identifiable components or hurdles (*e.g.*, past experience, written test, medical examination, interview, background check), there would be twenty-five "cells" or checkpoints at which adverse impact would have to be evaluated. In such instance it is likely that by sheer chance,[17] one or more of the decision points would show an adverse impact on a protected group, thus very possibly exposing the employer —

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[16]The adverse impact rule is available to the "members of any race, sex or ethnic group," not just to racial minorities. UGESP, 29 CFR §§ 1607.3A, 1607.4D (1979); see also *Davis v. County of Los Angeles,* 566 F.2d 1334, 1341 n. 12 (9th Cir. 1978) *vacated as moot, sub. nom. County of Los Angeles v. Davis,* 440 U.S. 625 (1979). It would include whites because Title VII has been held to protect whites as well as racial minorities. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 286-287 (1976).

[17]"Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *City of Los Angeles, Dept. of Water v. Manhart, supra,* 435 U.S. 702, 710 n. 20; see also *Brown v. New Haven Civil Service Board, supra,* 474 F.Supp. at 1263.

and the courts — to the burden of a judicial proceeding in which the employer must establish the job relatedness of the requirement or requirements which gave rise to the adverse impact. In the meanwhile, hiring or promotions pursuant to the selection process may have been enjoined, with the consequent impairment of the employer's business, or if it is a public employer, the public's business. Or if hirings or promotions are allowed to proceed, it would be at the employer's risk of back pay or front pay or of other liability to a plaintiff or group of plaintiffs.

In principle, there is little or no difference between judicial scrutiny of the job relatedness of a particular hurdle in a multifaceted selection process, just because that hurdle happens to have a disparate impact, and judicial scrutiny of one section of an employment test, when that section has an adverse impact on a protected group and a member of that group failed that section, with the result that he failed the exam and was disqualified for selection.

> Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a 'subtest' of the 'subtest.'

Smith v. Troyan, 520 F.2d 492, 498 (6th Cir. 1975), *cert. den.* 426 U.S. 934 (1976).

III.

SINCE THE EXAMINATION WAS USED WITHOUT INTENT TO DISCRIMINATE BECAUSE OF RACE AND PURSUANT TO A BONA FIDE MERIT SYSTEM, THE PROOF OF ADVERSE IMPACT DID NOT MAKE OUT A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION

A. The Mansfield-Dirksen Amendment Applies To Employment Examinations Administered Pursuant To A Bona Fide Merit System.

The Senate proceedings surrounding the adoption of the Tower Amendment reveal that employment examinations are covered not only by the second portion of § 703(h), discussed above, but also that some employment examinations are encompassed by the first portion of that statute insofar as these particular examinations are administered pursuant to a bona fide merit system.

In introducing his proposed amendment, Senator Tower stated that his amendment, which arose "from my concern about what happened in the Motorola FEPC case," was an effort to protect employers who used examinations as a "means of determining the trainability and competence of a prospective employee, or the competence of one who is currently employed and being considered for promotion." 110 Cong. Rec. 13492 (1964). The proponents resisted this amendment. Senator Humphrey took the lead and stressed that Senator Tower's concern for such tests had been addressed by the leadership when it formulated and introduced on the previous day (June 10, 1964), the comprehensive Mansfield-Dirksen Amendment[18] (Amend-

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[18]The amendment provided in relevant part:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or

ment No. 1052, 110 Cong. Rec. 13310-13319), which, under Title VII, included a specific section to deal with the *Motorola* situation. He stated:

> Mr. President, I yield myself 30 seconds to say that the substance of this amendment was given the most careful consideration at the time the leadership group met to perfect the so-called package substitute. Needless to say, the amendment was of grave concern to us because it refers to a case in the State of Illinois, and that matter was well represented by none other than the distinguished minority leader.
>
> Every concern of which this amendment seeks to take cognizance has already been taken care of in title VII, as amended, and presented in the substitute. *These tests are legal. They do not need to be legalized a second time. They are legal unless used for the purpose of discrimination.* The amendment is unnecessary. It would only complicate the package amendment, which has been carefully drawn and represents the considered views on the part of those concerned about title VII.

110 Cong. Rec. 13504 (emphasis added).

Later, in response to a question from Senator Lausche about the circumstances under which employee tests would be valid, Senator Humphrey reiterated:

> different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

110 Cong. Rec. 13315. This language ultimately became the first clause of § 703(h), 42 U.S.C. § 2000e-2(h).

> Such tests are considered to be legal; there has never been a denial of that. The only point is that the test that is used for purposes of discrimination would be declared illegal.

Ibid. Senator Case, a Senate Floor Captain for Title VII,[19] likewise argued on two occasions that Senator Tower's proposed amendment was unnecessary and also stated that the amendment would tend to complicate a case of "actual discrimination." 110 Cong. Rec. 13503, 13504.

Shortly thereafter Senator Miller spoke of the Mansfield-Dirksen Amendment as follows:

> I believe that during the development of the amendment the question of its not being an unfair labor practice for an employer to provide for the furnishing of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings was discussed.

110 Cong. Rec. 13504.

Senator Miller then went on to ask the following question regarding the Tower Amendment:

> Would not a test of such as is covered by the amendment have to be included in the concept of such a system as I have mentioned?

Ibid.

Senator Humphrey answered in the affirmative. 110 Cong. Rec. 13504.

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[19]See *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 351 n. 35.

Senator Miller expressly acknowledged the correctness of Senator Humphrey's position on the next day and went on to state:

> I point out that the phrase 'privileges of employment pursuant to a bona fide seniority or merit system' is intended to include such examinations.
>
> I hope that statement will satisfy the Senator from Ohio, because that is the intention of Congress. If the Senator has some misgivings about it, I hope he will take this assurance, because it was clearly spelled out yesterday.

110 Cong. Rec. 13651.

Therefore, it must be concluded that the Mansfield-Dirksen Amendment which contained the first portion of § 703(h) encompassed an employment examination administered as part of a bona fide merit system. The 1972 amendments to Title VII, which brought the petitioner, State of Connecticut, within the purview of the Act, also brought the petitioner's merit system within the protection of the Mansfield-Dirksen Amendment.

B. The Examination Was Unquestionably Administered Pursuant To A Bona Fide Merit System Without Intention To Discriminate.

There is no doubt that the promotional examination was developed and administered and its results used within the framework of Connecticut's merit system. The respondents brought the State's merit system into issue in their pendent jurisdiction cause of action when they claimed that the examination violated Conn. Gen. Stat. § 5-219. Amended Complaint, ¶ 36 (J.A. 9). Sec. 5-219, entitled "Character of Examinations," requires that examinations "fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment."

Sec. 5-219 is an essential part of Chapter 67 of the Connecticut General Statutes, known as the "State Personnel Act." Conn. Gen. Stat. § 5-193. The guiding principle of the Act is that "[t]he system of personnel administration for employees in the state service shall be based on merit principles." Conn. Gen. Stat. § 5-195. The chapter "established a civil service system based upon principles of merit...." *Engle v. Personnel Appeal Board,* 175 Conn. 127, 131, 394 A.2d 731, 734 (1978). The system embodied in the chapter "was designed to eliminate, as far as practicable, the 'spoils' system of making appointments based upon political affiliations, and to prevent discrimination in appointments and dismissals based upon considerations other than fitness to perform a job." *Wagner v. Connecticut Personnel Appeal Board,* 170 Conn. 668, 671, 368 A.2d 20, 22 (1976); see also *State ex rel. McNamara v. Civil Service Commission,* 128 Conn. 585, 588, 24 A.2d 846, 847 (1942). These obectives are achieved substantially through competitive examinations which produce lists of candidates eligible for selection. *Resnick v. Civil Service Commission,* 156 Conn. 28, 31, 238 A.2d 391, 392 (1968).

The bona fide nature of the State of Connecticut's merit system is established in law and cannot be disputed. The system has existed in basically its present state continuously since 1937. Conn. Gen. Stat. § 422d, *et seq.* (1937 Supp.). Its entire appointment and promotions process is tightly controlled by law. Conn. Gen. Stat. §§ 5-216 - 5-230, inclusive. Applicants for employment or promotion are given, *inter alia,* the rights to appeal rejections of their applications to take an examination, to inspect their examinations and to be free of discrimination in appointments or promotions because of expression of political opinions or because of political affiliations. Conn. Gen. Stat. §§ 5-221a, 5-225, 5-227. Despite the advent of collective bargaining for state employees in 1975, the appointment process of the merit system itself has remained by law inviolate and under the

control of the state legislature. Conn. Gen. Stat. § 5-272(d).[20] Finally, as pointed out above, the examinations themselves must be prepared so as to test fairly the qualifications, fitness and ability of the candidates to perform the job in question. The system is obviously bona fide.

The merit system examination results were used in conjunction with other factors by the "appointing authority," petitioner Maher, Commissioner of Income Maintenance, when he made his selections of persons to be promoted. *Teal v. Connecticut, supra,* 645 F.2d at 135 (App. to Pet., p. 7a). The actual selections involved the exercise of discretion by the appointing authority performing his duties under the State's merit system. Conn. Gen. Stat. §§ 5-228, 5-229. The appointing authority chose those persons who would, in the words of § 703(h), enjoy "the terms, conditions or privileges of employment" incident to positions in the class of Welfare Eligibility Supervisor. The choice of such persons pursuant to the State's merit system was not unlawful discrimination in this case, unless, according to § 703(h), there was an intention to discriminate on the basis of race.

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[20]Sec. 5-272(d) provides:

> Nothing herein shall diminish the authority and power of the personnel appeal board, the department of administrative services or any state agency established by statute, charter or special act to establish, conduct and grade merit examinations and to rate candidates in order of their relative excellence from which appointments or promotions may be made to positions in the competitive division of the classified service of the state served by the department of administrative services. The establishment, conduct and grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists shall not be subject to collective bargaining.

Here the District Court found no intention to discriminate on the part of any petitioners in this case. Memorandum of Decision of District Court (App. to Pet., p. 24a). To the contrary, the rate of selection of black candidates for the subject position totally belies any such claim.

Therefore, the merit system examination and selection procedure were protected by § 703(h). See *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 428 (2d Cir. 1975). "[T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 352. The same is, by the express language of § 703(h), no less true for the routine application of a bona fide merit system.

C. The Competitive Nature Of The Merit System Supports Inclusion Of The Examination Under The Mansfield-Dirksen Amendment.

There is an additional reason why an employment examination administered pursuant to a bona fide merit system without intent to discriminate should be deemed to be permitted by § 703(h). Section 5-196(k) of the Connecticut General Statutes defines "examination" as "an assessment device or technique yielding scores designed to determine the fitness of, and rank candidates in order of fitness for, a given class or classes." Examinations are to be "competitive." Conn. Gen. Stat. § 5-219. An appointment to a vacant position in the classified service whether from an agency promotional list or a service-wide promotional list, or from an open-competitive list, is to be from among persons having one of the top five ratings, with an additional rating made available for each additional vacancy. Conn. Gen. Stat. § 5-228(b), (c), (d). This kind of scheme, with the number of ranks from which the appointing authority can select being limited by the number of vacancies, is not unusual. See *Lee v. City of Richmond,* 456 F.Supp. 756, 764 (E.D.Va. 1978); also *Kirkland v. New York State Department of Correctional Services, supra,* 520 F.2d at 424. Rankings and the duty to

choose from among the highest ranks (usually the highest three or the highest five) are important parts of most states' merit systems.[21] When such rankings are used there can be an additional, heavier burden of showing job relatedness imposed on the employer. In the Second Circuit, validity for the purposes of establishing minimum qualifications is a lower order of validity than that necessary to justify the ranking of successful candidates on the examination. Exam results used to rank candidates require "such substantial test validity that it is reasonable to expect one — or two — point differences in scores

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[21] Ala. Code § 36-26-17 (Supp. 1981)
Cal. [Gov't] Code § 19057 (West 1980)
Colo. Rev. Stat. § 24-50-115 (1973)
Del. Code. Ann. tit. 29, § 5921 (1979)
Hawaii Rev. Stat. § 76-23 (Supp. 1980)
Idaho Code § 67-5309(e) (Supp. 1981)
Ill. Ann. Stat. ch. 127, § 63b 108b.5 (Smith-Hurd 1981)
Ind. Code § 4-15-2-19 (1976)
Iowa Code Ann. § 19A.9(7) (West 1978)
Kan. Stat. Ann. § 75-2943(1) (1975)
Ky. Rev. Stat. Ann. § 18.210(7) (Baldwin 1981)
Md. Gen. Laws Ann. art. 64A, § 17 (1979)
Mich. Stat. Ann. § 5.1191(13) (rev. ed. 1973)
Minn. Stat. Ann. § 43.18 (West Supp. 1981)
Minn. Stat. Ann. § 43.19 (West Supp. 1981)
Mo. Ann. Stat. § 36.240(3) (Vernon Supp. 1981)
Nev. Rev. Stat. § 284.265 (1979)
N.J. Stat. Ann. § 11:10-1 (West 1976)
N.Y. [Civ. Serv.] Law § 61 (McKinney 1973)
Ohio Rev. Code Ann. § 124.31 (Page Supp. 1980)
Okla. Stat. Ann. tit. 74, § 832 (West 1976)
Pa. Stat. Ann. tit. 71, § 741.601 (Purdon Supp. 1981)
R.I. Gen. Laws § 36-4-26 (1978)
Tenn. Code Ann. § 8-30-309 (Supp. 1980)
W. Va. Code § 29-6-8(5) (1980)
Wis. Stat. Ann. § 230.25(1) (West Supp. 1981)

The petitioners submit that such systems are prevalent in many, if not most, local governments.

to reflect differences in job performance." *Guardians Ass'n. of New York City v. Civil Service Commission,* 630 F.2d 79, 100-101 (2d Cir. 1980). A similar rule prevails in the Fifth and Eleventh Circuits. *Ensley Branch of N.A.A.C.P. v. Seibels,* 616 F.2d 812, 817 (5th Cir. 1980). The EEOC requires for a showing of validity of ranked scores that when criterion or construct validity are used, there be mathematical support for the proposition that persons who receive higher scores in the procedure are likely to perform better on the job. 29 CFR § 1607.5G (1979);[22] see also "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures." 44 Fed. Reg. 11996, 12005, Q. & A. 62 (1979).

Where a paper and pencil test is used, supported by content validity alone, and reading is an essential but not a major part of a job, use of a reading test for ranking purposes would not be sufficiently validated. *Id.* Q. & A. No. 62.

The competitive, ranking, nature of Connecticut's merit system should not, without express legislative authorization, be frustrated or broken down by judicial fragmentation of it into its parts, for the purpose of determining the disparate impact of those parts on a protected class, or the job relatedness of those parts or the rankings based on those parts.

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[22]29 CFR § 1607.5G provides in pertinent part:

> Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis..., the user should have sufficient evidence of validity and utility to support the ranking basis.

Connecticut, like other states with statutory civil service ranking system requirements, cannot be exonerated from such requirements by executive fiat. Nor can such requirements be eliminated by legislative action except at the expense of the important public interest in obtaining qualified workers and in maintaining public confidence in government. The competitive nature of civil service examinations, resulting in rankings, is one of the principal methods of achieving the objectives of the merit system in Connecticut. *State ex rel. Chernesky v. Civil Service Commission,* 141 Conn. 465, 469, 106 A.2d 713, 715 (1954). So, unlike a private employer who has flexibility in employment procedures, petitioners must work within the present system. The State of Connecticut, as an employer, had 45,082 full-time employees as of December 31, 1980; Connecticut Register and Manual, p. 854 (1981); most of these employees were in the classified service.[23] During the fiscal year ending on June 30, 1980, the petitioner Department of Administrative Services processed 40,000 applications for employment or promotion and actually administered 926 competitive examinations. Digest of Connecticut Administrative Reports, Vol. 34, p. 53 (1980). Yet, notwithstanding this staggering workload, the state may be in a position of concerning itself not just with proving the validity of examinations as pass/fail devices, but as ranking devices as well. If public employers are required to prove validity of all of their tests in this twofold manner, even when there is no discriminatory impact in hiring or promotions, they will have been subjected to even greater, more costly, burdens than private employers.

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[23]In Connecticut, an employee is deemed to be in the classified service unless specifically exempted by statute. Conn. Gen. Stat. §§ 5-196(e), 5-197, 5-198.

CONCLUSION

It would be contrary to the intent of Congress in Title VII, to past precedent, and to public policy and sound judicial administration, for the Court, upon a mere showing of the disparate impact of a component of the selection process, to cast upon the petitioners the burden of proving the job relatedness of that component. For the foregoing reasons, the petitioners pray that the judgment of the Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

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December 3, 1981

NO. 80-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT, *et al.*
Petitioners,

V.

WINNIE TEAL, *et al.*
Respondents.

APPENDIX TO BRIEF OF PETITIONERS

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RELEVANT SECTION OF 1937 SUPPLEMENT TO CONNECTICUT GENERAL STATUTES

Sec. 422d. Merit System. There is established a merit system for employees of the state. All appointments to, and promotions in, positions in the state service, except as hereinafter specified, shall be made only according to merit and fitness, to be ascertained by examinations, which examinations shall be competitive and given in accordance with the provisions of this chapter. The merit system shall be administered by the personnel department, established under the provisions of Section 425d.

RELEVANT SECTIONS OF THE CONNECTICUT GENERAL STATUTES (Rev. 1981)

Sec. 5-193. Short title. This chapter [Chapter 67] shall be known and may be cited as the State Personnel Act.

Sec. 5-194. Construction and administration. This chapter shall be so construed and administered as to provide a uniform and equitable system of personnel administration of employees in the state service. Recruitment, selection, appointment, development, promotion, transfer, layoff, classification, compensation, discipline, separation and provision for the welfare of state employees shall be performed in a manner to secure and retain well qualified employees to carry out state programs effectively and efficiently and to provide reasonable stability of employment in the state service.

Sec. 5-195. Merit principles to be observed. The system of personnel administration for employees in the state service shall be based on merit principles. All appointments and promotions, except as hereinafter specified, shall be made according to merit and fitness as ascertained by examinations given in accordance with provisions of this chapter.

Sec. 5-196. Definitions. The following terms, when used in this chapter, shall have the following meanings unless the context otherwise requires:

* * *

(e) "Classified service" means every office or position in the state service, whether full-time or part-time, for which compensation is paid, except those offices and positions specified in section 5-198 or otherwise expressly provided by statute.

* * *

(k) "Examination" means an assessment device or technique yielding scores designed to determine the fitness of, and rank candidates in order of fitness for, a given class or classes.

* * *

Sec. 5-197. Offices in state service to be classified; exceptions. Any office or position in the state service, whether full-time or part-time, shall be a position in the classified service, except as hereinafter set forth in this chapter or otherwise specified by statute.

Sec. 5-198. Positions exempt from classified service. The offices and positions filled by the following-described incumbents shall be exempt from the classified service:

(a) All officers and employees of the judicial department;

(b) All officers and employees of the legislative department;

(c) All officers elected by popular vote;

(d) All agency heads, members of boards and commissions and other officers appointed by the governor;

(e) All persons designated by name in any special act to hold any state office;

(f) All officers, noncommissioned officers and enlisted men in the military or naval service of the state and under military or naval discipline and control;

(g) All superintendents or wardens of state institutions, the state librarian, the president of The University of Connecticut and any other commissioner or administrative head of a state department or institution who is appointed by a board or commission responsible by statute for the administration of such department or institution;

(h) The state historian appointed by the state library board;

(i) Deputies to the administrative head of each department or institution designated by statute to act for and perform all of the duties of such administrative head during his absence or incapacity;

(j) No more than three executive assistants to each state elective officer and each department head, as defined in section 4-5, except that an agency which has within it separate divisions under any provision of the general statutes, for other than administrative purposes, may have one additional executive assistant for each division but no more than five such assistants per agency, provided each position of executive assistant shall have been created in accordance with section 5-214. Executive assistant positions in excess of the number so permitted may be retained through December 31, 1979, unless vacated prior to that date;

(k) One personal secretary to the administrative head and to each under-secretary or deputy to such head of each department or institution provided any classified employee whose position is affected by this subsection shall retain classified status in such position;

(l) All members of the professional and technical staffs of the constituent units of the state system of higher education as defined in section 10-322a, of all other state institutions of learning, of the board of higher education, and of the agricultural experiment station at New Haven, professional employees of the state board of education and teachers certified by the state board of education and employed in teaching positions at state institutions;

(m) Physicians, dentists, student nurses in institutions and other professional specialists who are employed on a part-time basis;

(n) Persons employed to make or conduct a special inquiry, investigation, examination or installation;

(o) Students in educational institutions who are employed on a part-time basis;

(p) Forest fire wardens provided for by section 23-36;

(q) Patients or inmates of state institutions who receive compensation for services rendered therein;

(r) Employees of the governor including employees working at the executive office, official executive residence at 990 Prospect Avenue, Hartford and the Washington D.C. office;

(s) Persons filling positions expressly exempted by statute from the classified service;

(t) Librarians employed by the state board of education or any constituent unit of the state system of higher education;

(u) Employees in the senior civil service.

* * *

Sec. 5-216. Establishment of employment lists. Continuous recruitment. Waiver of appointment. (a) From time to time, as deemed necessary to supply the needs of the state service, the commissioner of administrative services shall hold examinations for the purpose of establishing employment lists for the various classes of positions in the classified service. In establishing any employment list following examinations, the commissioner of administrative services shall place on the list, in the order of their ratings, the names of persons who show they possess the qualifications which entitle them to be considered eligible for appointment when a vacancy occurs in any position allocated to the class for which such test is held or for which such employment list is held to be appropriate. Such ratings may take such form as said commissioner deems appropriate to describe the performance of any candidate on any examination.

(b) Where the needs of the service indicate that continuous recruitment is justified, the commissioner of administrative services may defer announcing a closing date for filing applications for the necessary test until such time as the employment lists promulgated as a result of such recruitment are adequate. Announcements of such examinations shall specify that recruitment is continuous and that applications may be filed until further notice. All candidates who pass such continuous recruitment examinations shall be graded on a pass-fail basis, and all candidates who pass shall be immediately eligible for certification and appointment.

(c) The commissioner of administrative services may consolidate, continue or cancel employment lists and may remove names from such lists for good cause.

(d) Any person who has twice waived appointment shall be placed at the foot of the employment list. Any person who has twice failed to reply to notification of availability of a position shall not be certified again unless such person so requests.

Sec. 5-217. Effective period of lists. The commissioner of administrative services shall specify, at the time any employ-

ment list is promulgated, the period during which such list shall remain in force. In no case shall an employment list remain in force for a period of less than six months or more than one year, unless the period is extended by the commissioner for a period not to exceed an additional two years.

Sec. 5-218. Examinations; notices. (a) The commissioner of administrative services shall prepare lists of preliminary requirements and subjects of examination for the several positions in the classified service and advertise each such examination in such manner as the nature of the examination requires. All competitive examinations shall be held at such times and places as, in the judgment of the commissioner of administrative services most nearly meet the convenience of applicants and needs of the service.

(b) The commissioner of administrative services shall give public notice of such examinations for positions in the classified service at least two weeks in advance by posting, or causing to be posted, an appropriate notice on the bulletin board maintained in or near the quarters of the department of administrative services, by advertising such examination once in at least one newspaper published in each congressional district in the state and by submitting the notice to the director of the state employment service. Such notice shall set forth the time, place and general scope of the examination and shall contain appropriate information concerning the duties, work location, conditions, salary and requirements of the positions, and the examination procedures, including the weights to be given for the weighted parts of the examination if applicable.

Section 5-219. Character of examinations. Qualifications for admission. Examinations shall be in such form and of such character and shall relate to such matters as will fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment. Examinations shall be formulated in cooperation with agencies appointing specific classes of employees and shall be competitive, free and, except as other-

wise expressly provided by statute, open to all persons who may be lawfully appointed to any position in the class for which examinations are held, with such limitations as to age, residence, health, habits, character, sex and qualifications as are considered desirable by the commissioner of administrative services and as are specified in the public announcement of the test, provided no such limitation shall be made as to age or sex except in the case of a bona fide occupational qualification or need. In determining the qualifications of persons who will be admitted to an examination, consideration shall be given to any previous volunteer experience which such persons may have. No requirement as to formal education except for entrance training positions shall be established for the taking of such examinations. Examinations may take the form of written or oral tests, demonstration of skill or physical ability, experience and training evaluation, or in the case of promotional examinations, evaluation of prior performance, or any other examination devices deemed appropriate to measure the knowledge, skill or ability required to perform the duties of the job. All persons competing for placement on any one employment list shall be administered the same examination or examination phases and be required to achieve passing scores on each successive phase and for the examination as a whole in order to remain in competition. The provisions of this section shall be the sole determinant for qualification and no other examination or device shall be permitted by any agency head to further qualify persons seeking appointment except as authorized by said commissioner.

Sec. 5-219a. Volunteer experience considered. Analysis of personnel hirings. (a) It shall be the policy of all state agencies to consider volunteer experience as partial fulfillment of training and experience requirements for state employment. The commissioner of administrative services shall adopt regulations in accordance with the provisions of chapter 54 to implement such policy.

(b) Each state agency shall include an analysis of personnel hirings for the preceding year in its annual report to the governor. Such report shall indicate the extent to which volunteer

experience was taken into account in determining the qualifications of applicants for state employment.

Sec. 5-220. Conduct of examinations. (a) Examinations shall be conducted by the commissioner of administrative services or under his direction by an authorized agent. In giving examinations for positions in the classified service, the commissioner may obtain the assistance of persons not on the regular staff of the department of administrative services, either within or without the classified service. When such persons are in the state service, it shall be deemed a part of their official duty to act as examiners without extra compensation.

(b) The commissioner of administrative services may fully or partially delegate to the heads of state agencies the authority to administer specified promotional examinations subject to post audit by the department of administrative services. The delegation plan shall be approved by said commissioner, shall provide for consideration of all eligible persons and shall include adequate notice of the vacancy or vacancies to all potentially eligible employees, the procedures for application and methods to be used to determine the rating of eligible persons.

Sec. 5-221. Rejection of applicants. (a) The commissioner of administrative services may reject the application of any person for admission to a test for establishing an employment list for the classified service, or refuse to test any applicant, or refuse to certify the name of an eligible, for such service, who has been found to lack any of the established qualifications for the position for which he applies or for which he has been tested or who is physically or medically unfit to perform effectively the duties of the position in which he seeks employment or who is addicted to the habitual use of drugs or intoxicating liquors or who has been dismissed from the public service for delinquency, incompetency, misconduct or neglect of duty, or who has made a false statement of any material fact or practiced or attempted to practice any deception or fraud in his application, in his tests or in securing his eligibility or appointment.

(b) The commissioner of administrative services may establish reasonable procedures concerning investigation of the character, reputation, experience and training of applicants.

Sec. 5-221a. Appeal from rejection of application for admission to examination. Within seven days of the receipt by an applicant for employment or an employee in the state classified service of a notice of rejection of his application for admission to an examination held for the purpose of establishing an employment list for any position in the classified service, such applicant or employee may appeal such rejection to the commissioner of administrative services. The commissioner shall forthwith appoint a panel consisting of one personnel officer from each of three state agencies, each of which has more than one hundred employees, which panel shall hear and decide upon such employee's appeal within sixty days from the date such appeal was received by the commissioner.

Sec. 5-222. Unassembled examinations for certain professional positions. Regulations. Section 5-222 is repealed.

Sec. 5-223. Rating of examinations. The final earned rating of each person who competes in and passes each phase of any test shall be determined by the weighted average of the earned ratings on all phases of the test, according to weights for each phase established by the commissioner of administrative services in advance of the giving of the tests and published as a part of the announcement of the examination.

Sec. 5-224. Credit for military service on examinations. Any veteran who served in time of war, if such veteran is not eligible for disability compensation or pension from the United States through the veterans' administration, or the spouse of such veteran who by reason of such veteran's disability is unable to pursue gainful employment, or the unmarried surviving spouse of such veteran, and if such person has attained at least the minimum earned rating on any examination held for the purpose of establishing an employment list, as provided in section 5-216, shall have five points added to his or her earned rating. Any

such veteran, or the spouse of such veteran who by reason of such veteran's disability is unable to pursue gainful employmen or the unmarried surviving spouse of such veteran, if such person is eligible for such disability compensation or pension and if he or she has attained at least the minimum earned rating on any such examination, shall have ten points added to his or her earned rating. Names of such veterans and the names of such spouses or surviving spouses shall be placed upon the lists of eligibles in the order of such augmented ratings. Credits shall be based upon examinations with a possible rating of one hundred points.

Sec. 5-225. Notice of ratings on examinations. Candidate's right of inspection. All persons competing in any test shall be given written notice of their final earned ratings and except in the case of an examination administered in accordance with the provisions of subsection (b) of section 5-216, shall be given written notice of their relative standing upon the eligible lists or of their failure to attain a place upon such lists. The papers, markings and other items used in determining the final earned ratings, other than the questions and other materials constituting the test itself, shall be open to inspection by the candidate, subject to such regulations as may be issued by the commissioner of administrative services.

Sec. 5-226. Corrupt practices in relation to examinations and appointments. No person, by himself or in cooperation with one or more persons, shall wilfully defeat, deceive or obstruct any person in respect to his right of taking any examination or examinations or of receiving appointment to any position in the state classified service according to this chapter or according to any regulations made hereunder; shall wilfully or corruptly or falsely mark, rate, grade, estimate or report upon the examination or examinations or standing of any person tested whose name has been placed upon any employment or reemployment list or certified pursuant to the provisions of this chapter, or aid in so doing; shall wilfully make any false representation concerning any application or examination or concerning the person examined; shall wilfully or corruptly furnish to any person

any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined or certified, or being tested or certified, or shall impersonate any other person or permit or aid in any manner any other person to impersonate him in any examination or appointment or request to be tested, certified or appointed, or shall use, represent to use, promise or endeavor to use influence or official or political authority to secure for any person any appointment or prospect of appointment to any position in the classified service.

Sec. 5-227. Discrimination prohibited. No person in the classified service or seeking admission thereto may be appointed, demoted or dismissed or be in any way favored or discriminated against because of his political opinions or affiliations or as the result of a discriminatory employment practice as defined in section 46a-51. No question in any examination or contained on any form used in connection with carrying out the provisions of this chapter may relate to political or religious opinions or affiliations of any competitor, prospective competitor or eligible person on any employment or reemployment list established and maintained by the commissioner of administrative services.

Sec. 5-228. Promotional appointments. Original appointments. Sex discrimination. (a) When a vacancy in any permanent position in the classified service is to be filled, the appointing authority shall notify the commissioner of administrative services of such fact, stating the title of the position to be filled. Vacancies in such positions shall be filled, so far as practicable and for the best interest of the state, by promotional appointments from within the agency and servicewide promotional appointments in accordance with regulations issued by the commissioner of administrative services. The appointing authority, with the approval of the commissioner of administrative services shall decide whether a vacancy shall be filled by promotion from within the agency, from a statewide employment list, or if such is not practicable, by original appointment or transfer.

(b) If a vacancy is to be filled by a promotional appointment from within the agency, the commissioner of administrative services shall first certify to the appointing authority the names of all persons from the agency having the five highest final earned ratings in competitive examinations open to those who have served a minimum time established by regulation in such lower class or classes of positions as are designated with one additional earned rating for each additional vacancy. If necessary to complete the certification, the commissioner of administrative services shall then certify in order of final earned ratings the names of those persons highest on a servicewide employment list.

(c) If a vacancy is to be filled by promotion from a servicewide employment list, the commissioner of administrative services shall certify to the appointing authority the names of all persons having the five highest final earned ratings on that employment list.

(d) If a vacancy is to be filled by an original appointment, the commissioner of administrative services shall certify to the appointing authority the names of the five persons highest on the reemployment list for the class to which the vacant position has been allocated, or, if no reemployment list for the class exists, all persons having the five highest earned ratings on the employment list for the class or on the employment list held appropriate. The appointing authority shall be entitled in a certification to not less than five earned ratings for one vacancy and one additional earned rating for each additional vacancy. After a candidate has been certified three times to the same appointing authority and has not been accepted by such authority, his name shall not again be certified to such authority, except at the request of such authority.

(e) Appointees shall be required to serve the working test period provided for in this chapter. Any promotional appointee from within the agency who is dismissed from the position to which he was promoted during such working test period, or at the conclusion thereof, shall be restored to a position in the

same class in which he had been employed prior to his promotion. Any other appointee who was employed in the classified service prior to his appointment and who is dismissed from the position to which he was appointed during such working test period or at the conclusion thereof, shall be restored to a vacancy in the same class, or a vacancy in a comparable class or a vacancy in any other position the employee is qualified to fill, in the agency in which he had been employed prior to his appointment, or shall have his name placed on a reemployment list. No appointing authority who has removed such an employee as herein provided may exercise such right of removal again with respect to any other employee in the same position within three calendar months after such original removal, except with the consent of the commissioner of administrative services. No provision of this section shall be construed to prevent any employee in the unclassified service from competing for positions in the classified service if he possesses the minimum qualifications established by the commissioner of administrative services, except that no such employee shall be eligible to compete in a promotional examination unless a minimum of four qualified applicants file. In the certification of names of persons eligible for appointment, sex shall be disregarded except when otherwise provided by statute or upon request of the appointing authority subject to the approval of the commissioner of administrative services.

Sec. 5-229. Time for appointment. Effective date. An appointing authority, upon receipt of certification of eligibles for appointment to the classified service, shall appoint such an eligible person within a reasonable time fixed by the commissioner of administrative services, except that appointment of such an eligible person need not be made if said commissioner of administrative services, upon good cause shown, approves the request of an appointing authority that no appointment be made. Such appointment shall be effective on the date designated by the appointing authority. If the appointing authority is unable to make arrangements with a person whose name has been certified to begin work within a period of time which he considers reasonable, he shall report such fact to the commis-

sioner of administrative services, who may, in accordance with applicable regulations, certify the name or names of one or more additional eligible persons.

Sec. 5-230. Working test periods. The commissioner of administrative services shall establish appropriate working test periods of not less than three months nor more than one year for the various classes of positions. Within ten days preceding the termination of the working test period, and at such other times as the commissioner of administrative services requires, the appointing authority shall report to the commissioner of administrative services whether such employee is able and willing to perform his duties in a manner so as to merit permanent appointment. The requirement as to such reports for positions involving unskilled or semiskilled labor or domestic, attending or other housekeeping and custodial service at institutions may be waived. At any time during the working test period, after fair trial, the appointing authority may remove any employee if, in the opinion of such appointing authority, the working test indicates that such employee is unable or unwilling to perform his duties so as to merit the continuance in such position and shall forthwith report his action to the commissioner of administrative services. The name of any employee so removed, but who is considered by the commissioner of administrative services to be suitable for employment in some other department, agency or institution, may be restored to the employment list. For the purposes of this section any employee who has served part of a working test period in a position in the classified service who is, pursuant to examination, appointed to, and serves part of a working test period in, a position in a higher classification in a field of work directly related to his prior position, from which new position he is dismissed, shall, at his option, be reappointed to the position which he first had and his service in the working test period for such first position shall be deemed to include the time spent in the working test period for the higher position.

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Sec. 5-272. Prohibited acts of employers and employee organizations.

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(d) Nothing herein shall diminish the authority and power of the personnel appeal board, the department of administrative services or any state agency established by statute, charter or special act to establish, conduct and grade merit examinations and to rate candidates in order of their relative excellence from which appointments or promotions may be made to positions in the competitive division of the classified service of the state served by the department of administrative services. The establishment, conduct and grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists shall not be subject to collective bargaining.

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Sec. 46a-68. (Formerly Sec. 4-61s). State affirmative action plans; filing; monitoring; reports; regulations. (a) Each state agency, department, board and commission shall develop, in cooperation with the commission on human rights and opportunities, an affirmative action plan for equal employment opportunity in all aspects of personnel and administration. Such plan shall be developed pursuant to regulations adopted by the commission on human rights and opportunities in accordance with chapter 54 to ensure that affirmative action is undertaken as required by state and federal law to provide for equal employment opportunities and to comply with all responsibilities under the provisions of sections 46a-54 to 46a-64, inclusive, and sections 46a-70 to 46a-78, inclusive.

(b) Each state agency, department, board and commission shall file an affirmative action plan developed in accordance with subsection (a) of this section with the commission on human rights and opportunities, semiannually, on or before March first and September first of each year, except that any state agency, department, board or commission which has an

affirmative action plan approved by the commission may be permitted to file its plan on an annual basis in a manner prescribed by the commission.

(c) The commission on human rights and opportunities shall review and approve the content of such affirmative action plans within seventy-five days of the submission of each plan to the commission.

(d) The commission on human rights and opportunities shall monitor the activity of such plans within each state agency, department, board and commission and report to the governor and the general assembly on or before April first of each year concerning the results of such plans.

(e) The commission on human rights and opportunities shall adopt regulations, in accordance with chapter 54, to carry out the requirements of this section.

Sec. 46a-69. Discriminatory practices by state. It shall be a discriminatory practice to violate any of the provisions of sections 46a-70 to 46a-78, inclusive.

Sec. 46a-70. (Formerly Sec. 4-61c). Guarantee of equal employment in state agencies. (a) State officials and supervisory personnel shall recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race, color, religious creed, sex, age, national origin, ancestry, mental retardation or physical disability, including but not limited to, blindness, unless it is shown by such state officials or supervisory personnel that such disability prevents performance of the work involved.

(b) All state agencies shall promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state government. They shall regularly review their personnel practices to assure compliance.

(c) All state agencies shall conduct continuing orientation and training programs with emphasis on human relations and nondiscriminatory employment practices.

(d) The commissioner of administrative services shall insure that the entire examination process, including qualifications appraisal, is free from bias.

(e) Appointing authorities shall exercise care to insure utilization of minority group persons.